

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNNY F. O'BANNON,

Defendant-Appellant.

UNPUBLISHED

May 22, 2003

No. 233312

Wayne Circuit Court

LC No. 00-003375

Before: Cooper, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to commit murder, MCL 750.83, armed robbery, MCL 750.529, two counts of assault with intent to rob while armed, MCL 750.89, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a second-felony habitual offender, MCL 769.10(1)(a), to a two-year term of imprisonment for the felony-firearm conviction, to be served consecutive to four concurrent terms of twenty-five to forty years' imprisonment for each of the remaining convictions. He appeals as of right. We affirm.

Defendant first argues that the trial court abused its discretion by allowing the prosecutor to introduce evidence of his escape from custody in Farmington Hills. We disagree. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). A reviewing court may not substitute its judgment for that of the trial court regarding admissibility; there is no abuse of discretion where the evidentiary question is a close one. *Id.*

There was evidence from which the jury could infer that defendant knew that the police were looking for him after the charged crime. Specifically, evidence indicated that he fled the scene after the shooting, abandoned the getaway car, and contacted his girlfriend and asked her to meet him in secret. Contrary to defendant's argument on appeal, his opportunistic escape from custody was evidence of his consciousness of guilt and was therefore relevant to rebutting the defense theory of mistaken identification. *People v Cutchall*, 200 Mich App 396, 398-399; 504 NW2d 666 (1993). To the extent the purpose of the escape was ambiguous, the issue was for the jury to resolve. *People v Cipriano*, 238 Mich 332, 336; 213 NW 104 (1927); *Cutchall*, *supra* at 398. Additionally, we are not persuaded that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. See MRE 403. The trial court did not abuse its discretion in allowing this evidence.

Defendant next argues that the prosecutor's misconduct deprived him of a fair trial. We disagree. Claims of prosecutorial misconduct are reviewed on a case by case basis, and the challenged remarks are reviewed in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test for prosecutorial misconduct is whether the defendant was deprived of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267 and nn 5-7; 531 NW2d 659 (1995).

Several of the alleged instances of misconduct occurred outside the presence of the jury and, as such, could not have deprived defendant of a fair trial. The prosecutor's comments concerning continued custody and punishment, while improper, were brief and immediately followed by curative instructions. Because the instructions were sufficient to cure any perceived prejudice, see *People v McAlister*, 203 Mich App 495, 504; 513 NW2d 431 (1994), the trial court did not abuse its discretion in denying defendant's motion for a mistrial based on the comments. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001); *People v Rodgers*, 248 Mich App 702, 714-715; 645 NW2d 294 (2001).

Contrary to defendant's argument, the prosecutor did not attempt to elicit hearsay from defendant's girlfriend. Rather, when asked what defendant had said, the witness began to volunteer what defendant's aunt said. The prosecutor did not improperly elicit the response. Additionally, on cross-examination, defense counsel directly asked the witness to repeat what the aunt had said. To the extent this was inadmissible hearsay, it was elicited by defendant's attorney and cannot now form a basis for relief. Defendant cannot be allowed "to harbor error as an appellate parachute." *People v Shuler*, 188 Mich App 548, 552; 470 NW2d 492 (1991).

We agree that it was improper for the prosecutor to produce in court, and elicit testimony concerning, a weapon and ammunition that could not be connected to the charged crime or defendant. In so doing, the prosecutor injected into the trial issues broader than defendant's guilt or innocence. See *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999). Further, given the prosecutor's admission that the evidence was not relevant, we cannot characterize the prosecutor's conduct as a good-faith effort to admit evidence. Compare *Noble*, *supra* at 660-661 ("prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence").

However, contrary to defendant's argument, the evidence against him was substantial. Several witnesses saw the shooting and identified defendant. Additionally, the witnesses described the getaway car, which the police followed to a dead end, whereupon the occupants abandoned the vehicle and fled. Defendant Hill was found hiding nearby. The car belonged to defendant's girlfriend and papers belonging to defendant were found inside the car. Additionally, defendant made incriminating admissions to his girlfriend. Against this backdrop, and considering the court's instruction to the jury that the irrelevant evidence was not being admitted as evidence and should be disregarded, we cannot conclude that defendant was deprived of a fair trial.

The prosecutor's reference to God during closing argument was made in the context of arguing that certain instincts are part of human nature. The comment concerning how dangerous experiences are perceived in slow motion came close to impermissible vouching for the credibility of the three victims. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Nevertheless, considering the prosecutor's remarks as a whole, and in light of the court's

instruction that the attorneys' comments are not evidence, we are not persuaded that defendant was deprived of a fair trial.

Defendant next argues that the trial court erred in refusing to give a special requested instruction on the potential dangers of eyewitness identification testimony. See *People v Anderson*, 389 Mich 155, 172-180; 205 NW2d 461 (1973). We disagree. Claims of instructional error are reviewed de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). Jury instructions are reviewed as a whole rather than piecemeal. *People v Dabish*, 181 Mich App 469, 478; 450 NW2d 44 (1989). Even if somewhat imperfect, instructions are not grounds for reversal if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994).

This Court has held that a trial court is not required to give "any special jury instruction regarding the manner in which a jury should treat eyewitness identification testimony." *People v Cooper*, 236 Mich App 643, 656; 601 NW2d 409 (1999). Here, the trial court gave the standard instruction concerning identification, CJI2d 7.8, which directs the jury's attention to the factors that should be considered in assessing the reliability of a witness's identification testimony. Viewed as a whole, the court's instructions accurately stated the law and sufficiently protected defendant's rights.

Defendant also argues that the trial court erred in failing to sua sponte give a cautionary instruction on accomplice testimony with respect to the testimony of his girlfriend. We disagree. "The failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused." MCL 768.29; see also MCR 2.516(C). Where, as here, an instructional issue is unpreserved, it is reviewed for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 766-767, 772-773; 597 NW2d 130 (1999).

Our Supreme Court has held that it is error requiring reversal to deny a request for a cautionary instruction concerning accomplice testimony " 'and, if the issue is closely drawn, it may be reversible error to fail to give such a cautionary instruction even in the absence of a request to charge.' " *People v Reed*, 453 Mich 685, 691; 556 NW2d 858 (1996), quoting *People v McCoy*, 392 Mich 231, 240; 220 NW2d 456 (1974). Here, the evidence did not suggest that defendant's girlfriend was involved in the charged crime. Further, the concerns motivating the requirement of a sua sponte cautionary instruction were not present in this case. See *Reed*, *supra* at 691-693. There was no evidence of actual or implied threats by the prosecutor to charge defendant's girlfriend with any crime, and any potential problems with her credibility were thoroughly explored at trial. Additionally, the issue of defendant's guilt was not closely drawn. Therefore, defendant has failed to show a plain error.

Next, defendant argues that the trial court erred by failing to more thoroughly question a juror who was approached by a spectator. We disagree. Because defendant did not object below to the court's handling of this matter, we review this issue for plain error affecting defendant's substantial rights. See also *Carines*, *supra* at 763.

There is no indication that the juror's brief contact with the spectator was substantially related to any material aspect of the case, or that there was any connection between the contact and the verdict. *People v Budzyn*, 456 Mich 77, 89; 566 NW2d 229 (1997). Defendant has

failed to show that there was a real and substantial possibility that the contact affected the verdict. *Id.* at 88-89. Plain error has not been shown.

Defendant also argues that the cumulative effect of several errors deprived him of a fair trial. We disagree. In light of the overwhelming evidence of defendant's guilt, we conclude that the errors that did occur in this case did not cumulatively operate to deny defendant a fair trial. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

Next, defendant argues that the trial court erred in refusing to hold an evidentiary hearing on his motion to suppress two witnesses' in-court identifications made at his preliminary examination. We disagree.

This Court has held that an evidentiary hearing is not always required to resolve a defendant's constitutional challenge to the identification procedures used by the police. *People v Johnson*, 202 Mich App 281, 285-286; 508 NW2d 509 (1993). "Rather, where it is apparent to the court that the challenges are insufficient to raise a constitutional infirmity, or where the defendant fails to substantiate the allegations of infirmity with factual support, no hearing is required." *Id.* at 285. Further, "the reliability of identification evidence [is] primarily a question for the jury" *Id.* at 286.

In this case, there is no factual support for defendant's claim that the identification procedures used below were constitutionally improper, or that they had any effect on the witnesses' subsequent in-court identification. Further, at trial, the witnesses were cross-examined extensively concerning their opportunity to observe the two assailants, their distance from the assailants, what they were wearing, the lighting conditions, their descriptions of the assailants and their car, and other factors relevant to whether their identification of defendant had an independent basis. See *People v Gray*, 457 Mich 107, 111, 116; 577 NW2d 92 (1998). The trial court did not err in refusing to hold an evidentiary hearing. See *Johnson*, *supra* at 285-286.

Lastly, defendant argues that he is entitled to resentencing because the trial court erred in scoring the legislative sentencing guidelines. We disagree.

Defendant challenges the trial court's score of ten points for offense variable fourteen (OV14), which was based on the court's determination that defendant was a leader in a multi-offender situation. See MCL 777.44(1)(a). A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). In this case, evidence at trial indicated that defendant purchased the ammunition and provided the weapon used in the offense, that he also obtained the vehicle used in the crime, that he was the person who demanded money from the office employees and threatened to shoot them, that he shot the maintenance man, and that he drove the getaway car. This evidence was sufficient to support the trial court's score of ten points for OV14. Therefore, defendant is not entitled to resentencing.

Affirmed.

/s/ Jessica R. Cooper
/s/ David H. Sawyer
/s/ William B. Murphy

